Corner Furniture Discount Center, Inc., *and* Local 531, International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 2–RC–22448

August 21, 2003

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

The National Labor Relations Board, by a three-member panel, has considered objections to an election held October 22, 2001, and the administrative law judge's decision recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows six for and five against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the Employer's exceptions and brief, has adopted the judge's findings and recommendations as explained below, and finds that a certification of representative should be issued.

The Employer contends in Objection 2 that prounion employee Terence Cosgrove interfered with the election by threatening three bargaining unit employees that how they voted would become known by the Union and that if they voted against it, they would suffer reprisals. Like the judge, we reject this contention.

The credited testimony establishes that Cosgrove told employee Naded Santos that "they" would know how each employee voted. Santos subsequently informed her coworker "Sulky" about Cosgrove's statement. According to employee Carlton Ainsley, Cosgrove told him that "they would know, he would know" how Ainsley voted. Employee Edmund Brunning testified that during one discussion with Cosgrove where they tried to "figure out how everyone was voting," Cosgrove similarly told him that the election would not be by secret ballot, and that after the election he would know which employees voted and how they had voted. The judge overruled the objection, finding that the employees were only told that Cosgrove or "they"—not the Union—would know how the employees voted and that Cosgrove was not shown to be the Union's agent.

We agree that Cosgrove's statements do not warrant setting aside the election. We find, as the judge did, that the record fails to establish that Cosgrove was the Union's agent when he made the statements, and that viewed as third-party conduct, the statements were not objectionable conduct which would tend to create a general atmosphere of fear and reprisal rendering a free election impossible. We so find even if we assume, unlike the judge, that the statements constituted implicit threats of reprisal[1] rather than simple misstatements of fact.[2]

The burden of proving an agency relationship is on the party asserting its existence. *Millard Processing Services*, 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994); *Pierce Corp.*, 288 NLRB 97, 101, fn. 65 (1988), citing *Sunset Line & Twine Co.*, 79 NLRB 1487, 1508 (1948). Here, the Employer does not allege that Cosgrove had actual authority to make the remarks in question. Rather, it contends that he was clothed with apparent authority to speak on behalf of the Union.

Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988), citing Restatement (Second), of Agency § 27 (Comment a), 1958.

We find that the Employer has not shown that Cosgrove had apparent authority to make implicitly threatening statements concerning the secrecy of employees' ballots. See *Pan-Oston Co.*, 336 NLRB 305, 306 (2001) (party who has burden to prove agency must establish agency relationship with regard to specific conduct that is alleged to be unlawful). The record reveals no manifestation by the Union to the employees that would lead them to reasonably believe that it had authorized Cosgrove to make such remarks.

Here there is no evidence that the Union held Cosgrove out as its spokesman or did anything at all to place him in a position of importance. As Zirpoli testified, the Union only authorized Cosgrove to solicit authorization cards.[3] There is also no evidence that the Union condoned or was even aware of Cosgrove's statements to the employees. Indeed, Zirpoli effectively disavowed those statements by explaining to employees that

[1] There is no contention that Cosgrove threatened any employee with physical violence or damage to personal property, and none of the employees sustained physical harm or property damage either during the campaign or after the election.

[2] On March 13, 2002, the Board overruled Employer's Objection 1, which alleged that the Union misrepresented the Board's election processes by telling employees that the voting would not be done by secret ballot, and that the Union would know how they voted.

[3] It is undisputed that Cosgrove did not make the threatening statements while he solicited authorization cards. Contrast, *Davlan Engineering*, 283 NLRB 803, 804 (1987) (employees who solicit authorization cards are special agents of the union for the limited purpose of assessing the impact of statements they make about union policies while soliciting).

no one would know how they voted because the election would be conducted by secret ballot.

Contrary to the Employer's contention, evidence that Cosgrove organized and spoke at the Union's campaign meetings, solicited authorization cards, and played a leading role in the campaign does not establish that he was a general agent of the Union. See *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988) (holding that enthusiastic employee activist, who solicited and obtained signatures on authorization cards, organized and informed employees of union meetings, and served as election observer for union, was not general agent of union under the principles of actual or apparent authority where, inter alia, the union had its own admitted agent involved in the campaign). Such conduct merely reflected his status as a leading union supporter during the election campaign.[4] Id. And even if he was the Union's most active and vocal supporter at the Employer's facility, he was not the Union's only conduit to the employees. Thus, Zirpoli's participation in the Union's campaign meetings, as well as his individual contact with employees during the election campaign made it clear to the employees that the Union had its own spokesman separate and apart from active and enthusiastic union adherents such as Cosgrove.[5]

Accordingly, because we find that the Employer has failed to meet its burden of showing that Cosgrove had apparent authority to threaten employees on the Union's behalf, we find that his remarks are not attributable to the Union, and that the judge properly assessed them under the Board's standards for third-party conduct.

As the judge stated, the Board will set aside an election on the basis of third-party conduct only if the conduct is so aggravated that it creates a general atmosphere of fear and reprisal rendering a fair election impossible. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *Cal-West Periodicals, Inc.*, 330 NLRB 599, 600 (2000). The burden of proof lies with the objecting party. *Cal-West Periodicals*, supra at 600. The Board and the courts recognize that conduct by third parties is less likely to affect the outcome of the election, and that because unions (and employers) cannot control nonagents, the equities militate against setting aside elections on the basis of conduct by third parties. This is true even where, as here, a shift in one vote could have changed the outcome of the election. Id.

Applying that standard to the evidence in this case, we conclude that the Employer failed to prove that the conduct at issue was objectionable conduct warranting the setting aside of the election. In doing so, we do not rely on the employees' testimony that they felt insecure or unsure whether their votes would actually be confidential. It is well established that "'the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.'" *Picoma Industries, Inc.*, 296 NLRB 498, 499 (1989), quoting *Beaird-Poulan Division*, 247 NLRB 1365, 1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981). "Rather, the test is based on an objective standard." Id. See also *Teamsters Local 299* (*Overnite Transportation Co.)*, 328 NLRB 1231 fn. 2 (1999).

[4] See also *L & A Juice Co.*, 323 NLRB 965 (1997) (employee's holding union meetings deemed inconclusive of agency status); *Advance Products Corp*., 304 NLRB 436 (1991) (employee who was member of in-house organizing committee, solicited support for union, distributed union literature, buttons, hats, and shirts, kept union informed of events occurring in plant, and served as election observer for union, not general agent of union); *S. Lichtenberg & Co.*, 296 NLRB 1302, fn. 4 (1989) (no agency status existed where a group of self-designated individual employees became a "somewhat transitory, amorphous group," adjunct to a professional union staff that personally and actively directed the union's election campaign); *Cambridge Wire Cloth Co.*, 256 NLRB 1135, 1139 (1981), enfd. 679 F.2d 885 (4th Cir. 1982) (card solicitation insufficient to show agency status); *Tennessee Plastics, Inc.*, 215 NLRB 315, 319 (1974), enfd. 525 F.2d 670 (6th Cir. 1975) (union's most ardent employee advocate during organizational campaign found not to be union agent, where she was not the union's principal contact with voters and where union was represented on the spot by a full staff of agents led by an international union organizer who personally directed the campaign). Member Acosta agrees that the evidence does not establish that Cosgrove was an agent of the Union and, in so concluding, he relies heavily on union representative Zirpoli's presence and participation in the Union's campaign. See *Evergreen Healthcare, Inc. v. NLRB*, 104 F.3d 867 (6th Cir. 1997). Accordingly, he finds it unnecessary to rely on the all the cases cited in the footnote.

[5] *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436 (4th Cir. 2002), a case relied on by the Employer, wherein the court found two employees to be union agents, is inapposite. The court explained that its final inquiry in determining whether a person is acting as an agent for the union "'is always whether the amount of association between the union and the [employee] is significant enough to justify charging the union with the conduct.'" Id. at 442, quoting *PPG Industries v. NLRB*, 671 F.2d 817, 822 fn. 8 (4th Cir. 1982). In finding the union chargeable with the employees' threatening conduct, the court relied on several factors including that: the employees were instrumental in every step of the campaign process from obtaining authorization cards, to distributing union literature, to speaking with employees in the workplace, to calling them at home, often at the direct request of the union organizer; the employees were the union's only conduits of information; the union relied almost exclusively on the employees to effectuate its organizational campaign; and the union organizer did not obtain a single authorization card, distribute union literature, attempt to visit the facility or speak with employees beyond those present at three organizational meetings. Id. at 443. In contrast, here the evidence of apparent agency is tenuous at best. As discussed above, Zirpoli only authorized Cosgrove to solicit authorization cards, and unlike the union organizer in *Kentucky Tennessee Clay*, Zirpoli had contact with employees beyond those present at the Union's campaign meetings. Cf. *NLRB v. Herbert Halperin Distributing Corp.*, 826 F.2d 287, 291 (4th Cir. 1987) (finding that employees were not apparent agents of the union where professional union staff was heavily involved in the organizing campaign).

We agree with the judge that the employees could not reasonably have taken Cosgrove's threats seriously in light of the numerous assurances they received.[6] Here employees were told in definite terms by the Employer as well as the Union that how they voted would be kept confidential. Thus, the Employer distributed a letter that clearly stated that employees would vote by "SECRET BALLOT," and that no one would know how they voted. Sales Manager Frank Cosme also personally assured Santos and Ainsley that their votes would remain confidential. Zirpoli also offered similar assurances to employees at campaign meetings held by the Union prior to the election.[7] Finally, although this fact is not necessary to our decision, three days prior to the election, the Employer was required to post the Board's notice of election, which incorporates a sample ballot with words, "OFFICIAL SECRET BALLOT." See NLRB Casehandling Manual (Part Two) Representation, Section 11314 and form NLRB-707. The Employer presumably complied with this requirement, given the lack of any objection for failure to comply.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 531, International Brotherhood of Teamsters, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate Unit:

> All full-time and regular part-time sales representatives employed by the Employer at its facility located at 2916 White Plains Road, Bronx, New York, New York, but excluding all other employees, including sales managers, clerical employees, warehouse employees, information technology employees, and guards, professional employees, and supervisors as defined in the Act.

[6] The silent treatment the employees allegedly received from their prounion coworkers because of their perceived opposition to the Union during the course of the campaign is not objectionable. *United Builders*, supra, 287 NLRB at 1370. The Board and courts recognize that in a hotly contested election "a certain measure of bad feeling and even hostile behavior is probably inevitable." *Cal-West Periodicals*, supra, 330 NLRB at 600, citing *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984).

[7] *Associated Rubber Co. v. NLRB*, 296 F.3d 1055 (11th Cir. 2002), relied on by the Employer, is inapposite. In *Associated Rubber*, a union supporter, found not to be the union's agent, actually carried through on his verbal threat to make a union opponent "pay" for refusing to accept union material by making the opponent's working conditions harder for several hours a few days before the election, and arguably exposing him to risk of physical harm. Id. at 1060–1064. Unlike here, neither the union nor the employer repudiated the union supporter's conduct prior to the election.

MEMBER SCHAUMBER, concurring.

This is a close case but on balance I join with my colleagues in overruling the Employer's objection and in their determination that employee Terry Cosgrove was not an agent of the Union with respect to the alleged objectionable conduct. I write separately because I reach the same conclusion using a somewhat different path. Also, I part company with the majority's characterization of some Board precedent and its applicability here although I do not comment on all aspects of the majority's opinion with which I disagree.

By way of significant example, in determining whether the Employer met its burden of proving Cosgrove had apparent authority as the Union's agent when he made allegedly objectionable statements, the majority indicates there must be a basis to believe the Union authorized Cosgrove to perform the specific acts in question. However, it is well established that "a principal is responsible for its agent's conduct if such action is within the general scope of authority attributed to the agent, even if the principal did not authorize the particular act. In other words, it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted."[1]

In this regard, the nature of the inquiry into whether an employee is an agent of one party or another will be different if the employee is a supervisor. This is so because a supervisor is necessarily an agent of the supervisor's employer for at least some purposes. Consequently, the inquiry into whether certain conduct of a supervisor can be attributed to the employer has a different starting point and a different focus than, for example, the inquiry into whether certain conduct of a prounion employee during an organizational campaign can be attributed to the union.

I further note my disagreement with the majority over the implication in their decision that an employee who, like Cosgrove, organized and spoke at union campaign meetings, solicited authorization cards, and played a leading role in the campaign, could not, without more, be the apparent agent of the union for all statements and activities related to the campaign. I would find Cosgrove an agent clothed with apparent authority when he made the statements at issue were it not for the countervailing evidence, notably the active campaign role of the Union's paid agent Zirpoli and the statements made by Zirpoli which were inconsistent with the veiled threats being made by Cosgrove, all of which I believe warrant a find-

[1] *Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB 827, 828 (1984).

ing that the Employer failed to prove Cosgrove's agency by a preponderance of the evidence.

Finally, I agree that Cosgrove's statements casting doubt on the secrecy of employees' votes were not objectionable under the third-party conduct standard because those statements were clearly contradicted by the Union, by the Employer, and by the Board's election notice, but also because they appear to have been largely ineffective. Each of the three employees who testified that Cosgrove told them that "they" would find out how the employees voted, or words to that effect, voted in the election and none of them testified that his statement affected the ballot they cast. One of the three employees, Brunning, testified variously that he was "a little anxious," "a little wary," or "scared" by Cosgrove's statement, but he assured coworkers not to worry about it. He also admitted he was not retaliated against for voting the way he did, thus conceding that Cosgrove's statement did not affect his vote. Another employee, Ainsley, described his reaction to the threat in mild terms, one of "concern." The third employee, Santos, testified that Cosgrove told her a few days before the election that "they" would know how she voted. However, Manager Frank Cosme told her that her vote would be secret. Santos said she believed Cosme but felt "insecure" that others would find out.[2]

The above testimony coupled with the statements made by the Union, the Employer and set forth in the Board's notice with regard to the secrecy of the election support the conclusion that Cosgrove's statements in the end did not effect the election outcome. I note, however, that in an election decided by a single vote, proof of threatening statements to even one determinative voter can be the basis for setting aside the election. See, e.g., *Smithers Tire*, 308 NLRB 72 (1992) (employee threats to flatten the tires of employee Barfield if she voted against the union coupled with statements that others would know how she voted). However, for the reasons set forth above, I fail to find a similar rationale applicable for setting aside the election in this case.

[2] Relying on extant Board law that "the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct" (citations omitted), my colleagues do not rely on the testimony of the employee witnesses that "they felt insecure or unsure whether their votes would actually be confidential." In concurring, however, I have given some weight to the subjective reaction of the employees and respectfully suggest that Board law in this area should be revisited. We all agree that a reasonable person standard should apply in cases of this nature and we recognize the potential for mischief after an election is over and the results are in. Nevertheless, I do not subscribe to the view that an employee's subjective reaction is *irrelevant*. Such a rule replaces what may have been the actual, albeit subjective, reaction of the employee who was the target of the challenged conduct with the Board's subjective view of what a reasonable person's reaction should be. I find no warrant for such a one-sided rigid rule; indeed, it smacks of a certain degree of hubris. In my view, while the subjective reaction of the employee should not necessarily be determinative, it should be considered as a factor in judging the objectionable nature of the challenged conduct.